Supreme Court, U.S.
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No. OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

October Term, 1997

FRANK WOOD, TRUSTEE OF THE WOOD FAMILY TRUST

Petitioner,

v.

ELDEN W. BAINBRIDGE, TRUSTEE, ELDEN W. BAINBRIDGE TRUST, JUNE 13, 1968, et.al.,

Respondents.

PETITION FOR WRIT OF CERTIORARI
To The United States Court Of Appeals
For The Ninth Circuit

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QUESTIONS PRESENTED

1. Whether ***Pinkerton v. United States, 328 U.S. 640 (1946)***, ascribing affiliative criminal conspiratorial liability premised on mediate causation, equally applies to private RICO civil conspiracy claims.

2. Whether civil RICO conspiratorial liability requires a co-conspirator to agree to the contravention of a RICO substantive provision and actually commit two or more forms of racketeering activity.

3. Whether RICO ***respondeat superior*** liability obtains premised on mere relationship between the agent committing the racketeering activity and its passive, non acting principal who benefits as a result thereof.

4. Whether RICO civil aiding and abetting liability exists after ***Central Bank of Denver v. First Interstate Bank of Denver, 511 U.S. 164 (1994)***.

PARTIES INVOLVED

The parties involved are as follows:

Frank Wood, Trustee of the Wood Family Trust ("Petitioner").

Elden W. Bainbridge, Trustee of the Elden W. Bainbridge and Sharon Ann Bainbridge Trust, May 9, 1973; Elden W. Bainbridge, Trustee of the Elden W. Bainbridge, June 13, 1968; Elden W. Bainbridge, individually; Elden W. Bainbridge, Trustee of the Valeria A. Bolton, Intervivos Trust; Valeria A. Bolton, individually; Elden W. Bainbridge, Trustee of the Kenneth M. Botlon Intervivos Trust; Kenneth M. Bolton, individually; Elden W. Bainbridge, Trustee of the Dwight E. Bainbridge Intervivos Trust; Elden W. Bainbridge, Trustee of the Todd Bainbridge Intervivos Trust; Elden W. Bainbridge, Trustee of the Brian. Bainbridge Intervivos Trust; Elden W. Bainbridge, Trustee of the Marla Kay Bainbridge Intervivos Trust; Dwight E. Bainbridge, individually; Todd Bainbridge, individually, Marla Kay Bainbridge, individually; Brian Bainbridge, individually; Elden W. Bainbridge, Trustee of the Dwight E. Bainbridge Pavilion Trust; Elden W. Bainbridge, Trustee of the Marla Kay Bainbridge Pavilion Trust; Elden W. Bainbridge, Trustee of the ht Brian Bainbridge Pavilion Trust; Elden W. Bainbridge, Trustee of the Todd Bainbridge Pavilion Trust; Elden W. Bainbridge, Trustee of the Melvin Bainbridge Testamentary Trust; Elden W. Bainbridge, personal representative of the Estate of Melvin Bainbridge; Bainbridge Investments, Inc., a California corporation; Kenneth M. Bolton Intervivos Trust, May 17, 1993; B.I.I., Denver, Inc., a Colorado corporation; Airport Center, a California general partnership; Bainbridge-Eight Limited, a California limited partnership; Bainbridge-Long Beach, a California limited partnership; BBG, a California limited partnership; Bristol-

Bainbridge, a California limited partnership; Central Avenue, a California limited partnership; Claims Investments Ltd., II, a Colorado limited partenrship; Estelle 4, a California limited partnership; Big Estelle, a California limited partnership; Estelle 12, a California limited partnership; Estelle 5, a California limited partnership; Malibu-Bainbridge, a California general partnership; Bainbridge-Horn, Inc., a California corporation; Warren Road Partners, a Califoria general partnership; Jason II, Ltd., a California limited partnership; Bainbridge-One, Ltd., a California limited partnership; Bainbridge-Two, Ltd., a California limited partnership; Bainbridge-Three, Ltd.,, a California limited partnership; Bainbridge-Seven, Ltd., a California limited partnership; Bainbridge-Thirteen, Ltd., a California limited partnership; Bainbridge-Seven, Ltd., a California limited partnership; Bainbridge-Eleven Ltd., a California limited partnership; Bainbridge Seventeen, Ltd., a California limited partnership; Benson Ltd., a California limited partnership; Campus Bainbridge, Ltd., a California limited partnership; Cooler-Bainbridge, Ltd., a California liimited; Coronado Ltd., a California limited partnership; CZ-30, a California limited partnership; Eucalyptus, Ltd., a California limited partnership; Fountain Way Ltd, a California limited partnership; Golden Garden Ltd., California limited partnership; Gretta Lane, Ltd., a California limited partnership; Industrial Drive II, a California limited partnership; Industrial Drive IV, a California limited partnership; Industrial Drive V, a California limited partnership; La Palma Industrial, Ltd., a California limited partnership; Los Olivos Ltd., a California limited partnership; Sun Canyon Mobile Home Park, a California general partnership; Marble Canyon New Vista, a California limited partnership; Ready To Go, Ltd., a California limited partnership; Santa Anita 3, a California limited partnership; SAR Ltd., a California limited partnership; Valley Ltd., a California limited partnership; West Rialto Ltd., a California

limited partnership; Bainbridge Investments Incorporated Employee Profit Sharing Plan, a defined contribution plan; and, Willow Oaks Mobile Home Park, a California general partnership.

Heartland Lakeland Florida, a Washington limited partnership;Heartland Durham Triangle, a Washington limited partnership;
Heartland Morrisville Triangle, a Washington limited partnership; Heartland Durham Triangle, a Washington limited partnership; Heartland Fort Worth I-35, a Washington limited partnership; Heartland Group, Inc., a Washington corporation; and,Heartland Limited Partnership, a Washington limited partnership.

Orange County Christian Church, a tax exempt, non profit California corporation; The Little Church International, Inc., a tax exempt, non profit California corporation; Christian Fellowship Foundation, a tax exempt, non profit California corporation; William G. Kelley; Betty Watkins; Charles Hendricks; Edward Heagen; Fred Nash; and, George Vint.

Michael D. Cohen, individually; Michael D. Cohen, general partner, Yorba Street Limited, a California general partnership; general partner, Northwest Corona Industrial Park, a California general partnership

Marvin R. Maas and Jane Jensen Maas, individually; Marvin R. Maas and Jane Jensen Maas, trustees of the Maas Family (collectively "Respondents").

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit (App., ***infra,*** 1a-1) is a not for publication memorandum decision. Appellees'\Cross-Appellants' Petition for Rehearing was denied, 21 August 1997 (App. ***infra***, 1b-1), and is unreported. The opinion of the United States District Court for the District of Oregon dismissing the second amended complaint (App., ***infra,*** 1g-1) is also unreported

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JURISDICTION

The judgment of the Court of Appeals was entered 11 June 1997. Appellees'\Cross-Appellants' Petition for Rehearing was denied, 21 August 1997. The jurisdiction of this Court is invoked under Title 28 United States Code Section 1254(1).

STATEMENT

Except as noted, the following statement of facts is taken from the pleadings filed in the District Court and the Court of Appeals Memorandum.

Frank Wood ("Petitioner") and Elden W. Bainbridge were originally business partners engaged in developing real estate in southern California in the mid 1970s. They were successful in this endeavour, earning significant returns.

Bainbridge had previously practiced veterinary medicine before becoming involved with Wood in developing real estate. Bainbridge operated his business activities through various trusts. The Elden W. Bainbridge Trust, dated June 13, 1968, ("1968 Trust") and the Elden W. Bainbridge and Sharon Ann Bainbridge Trust, dated May 9, 1973, ("1973 Trust") were the principal trusts that were represented to hold substantial property interests, real, tangible, and intangible, worth millions of dollars.

Bainbridge also served as trustee of other trusts that were created for his adult children, his sister, and other family members. It appeared that these numerous trusts were employed by Bainbridge to function as borrowing vehicles to fund real estate activities. Bainbridge, acting in his trustee capacity on behalf of either the 1968 Trust or 1973 Trust, would also serve as either the sole or a co-general partner in various general and limited partnerships formed to engage in real estate development. The limited partners were usually various trusts that Bainbridge also functioned as trustee. Bainbridge also functioned as chief executive officer and managing director of various corporations that he formed to pursue various business ventures. The securities of those entities were also held by these two trusts.

Petitioner loaned Bainbridge $500,000 on January 7, 1988.Bainbridge represented to Petitioner that the loan was required for Bainbridge's real estate development activities. The loan was evidenced by a promissory note, signed by Bainbridge in his 1968 trustee capacity, and was secured by certain vacant real property located in southern California ("Hemet Property"). Petitioner felt secure in lending the funds to Bainbridge because of his represented financial worth.

In October, 1990, Bainbridge requested Wood to release the Hemet Property. Bainbridge told Petitioner that he intended to develop that property for the benefit of his adult children. The offered substitute collateral, a piece of real property located in Orange County, California ("Kaiser Property"), consisted of an income producing office building. Bainbridge told Petitioner that the security was sufficient to protect his loan. Petitioner agreed to the substitution. The promissory note was amended, however, to reflect the substitution of the 1973 Trust for the 1968 Trust as the obligor. Also, Bainbridge executed a guaranty in favour of Petitioner in connection with the substitution.

In December, 1991, Bainbridge requested Petitioner to execute a modification agreement to extend the term of the promissory note for one year from the original maturity date,

which was January 7, 1992. Bainbridge offered Petitioner an increase in the interest rate. The terms of the original note otherwise remained unchanged. Petitioner agreed to the modification.

In February, 1992, Bainbridge as trustee of the 1968 Trust, requested a $150,000 loan from Petitioner. Bainbridge represented to Petitioner that he needed the funds in order to close an escrow on a personal residence he was buying in the Denver, Colorado area. Petitioner wired the funds directly to Bainbridge. Bainbridge executed a promissory note in favour of Petitioner.

In August, 1992, Bainbridge requested Petitioner to release the Kaiser Property. The offered substitute collateral , a piece of vacant real property located in Riverside County, California, ("Riverside Property"), was represented by Bainbridge as sufficient security for Petitioner's loan. Bainbridge told Petitioner that he had expended over $700,000 on that realty. Based on that representation, Petitioner agreed to the substitution. Though Petitioner promptly reconveyed the Kaiser Property, Bainbridge did not effect the transfer of the Riverside Property until November, 1992.

In September, 1992, Petitioner requested Bainbridge to provide further collateral for both loans. Bainbridge executed

an agreement pledging Bainbridge's interests in two partnerships ("Estelle 4" and "Estelle 12"). These two entities were controlled and managed by Bainbridge as sole general partner in his trustee capacity of the 1968 Trust.

In October, 1992, Petitioner requested, and Bainbridge executed, a continuing guaranty that would assure protection of Petitioner's loans and repayment at maturity.

The promissory note matured on January 7, 1993. Petitioner learned that the Riverside Property had been subject to a superior lienholder, Republic Bank ("Republic"). Republic had previously declared its loan to Bainbridge, in his 1973 trustee capacity, in default. The Republic loan repayment had been extended early in 1991 and 1992 at the request of Bainbridge. When Republic commenced non judicial foreclosure, Petitioner demanded Bainbridge to protect his security. Bainbridge failed to provide adequate protection to Petitioner's security interest. The Republic foreclosure extinguished the underlying collateral on Petitioner's loan, rendering Petitioner to non secured creditor status. The loans were not repaid as required by the notes and the guaranties.

In May, 1993, Petitioner filed a complaint in Marion County, State of Oregon, ("State Action") against Bainbridge and the 1968 and 1973 Trusts. The action was for breach of the

$500,000 note and underlying guarantees. The $150,000 note was previously reduced to a stipulated judgment in May, 1993 against the 1968 Trust in a prior action. Petitioner subsequently ascertained that the 1968 Trust had no properties to attach to satisfy the judgment.

Bainbridge removed the State Action to Federal District Court based on federal diversity of citizenship. Bainbridge subsequently moved to dismiss the action for lack of personal jurisdiction and for improper venue. The motion was denied.

In December, 1993, Petitioner moved to amend the complaint to include claims under the federal Racketeer Influenced and Corrupt Organizations Act of 1970 ("RICO"). The RICO claims were pleaded alternatively to include primary, aiding and abetting, conspiracy, and vicarious liability theories. The amended complaint included approximately seventy-five additional defendants including trusts, partnerships, and corporations that were managed, controlled, and owned by Bainbridge, mostly in his capacity under both the 1968 Trust and the 1973 Trust, as well as other collateral entities and persons that functioned as passive, repositories for monies and properties transferred from the 1968 and 1973 Trusts. These additional defendants were ascertained by

reviewing various financial statements that Bainbridge had previously provided Petitioner.

The amended complaint only named Bainbridge and the 1968 and 1973 Trusts as having engaged in the racketeering activities alleged. The remaining defendants were alleged to be liable under the aforementioned alternative RICO liability theories. The District Court allowed the amendment.

On March 1, 1994, the District Court held a preliminary injunction hearing. Petitioner sought to prohibit the defendants from transferring or disposing of property during the course of the action. The District Court enjoined not only Bainbridge and the 1968 and 1973 Trusts, but also Secondary Defendants Estelle 4, Estelle 12, both partnerships, and four Pavilion Trusts. Bainbridge also served as trustee for these particular trusts. The District Court found that by Bainbridge applying Petitioner's $500,000 to satisfy various debts and obligations that were owed by Bainbridge entities, it freed up other money that Bainbridge could use for other activities. The District Court also found that if Petitioner could show one dollar of his $500,000 going into the vast array of Secondary Defendants controlled and operated by Bainbridge, that would be sufficient to ascribe RICO liability. (App. 1c-1).

On 1 June 1994, Petitioner subsequently moved for summary judgment on all of the claims contained in the first amended complaint. On September 29, 1994, the district court

denied summary judgment on the RICO claims, finding a "plethora" of material issues of fact regarding primary defendants Bainbridge and the 1968 and 1973 Trusts, and his interrelationship with Secondary Defendants. (App. 1d-1).

On March 10, 1995, the District Court entered partial summary judgment against Bainbridge and the 1968 and 1973 Trusts on the $500,000 note. (App. 1f-1). The District Court also entered an order on March 9, 1995, ruling that whether any other entities are jointly and severally liable on the $500,000 partial summary judgment would be determined after the action was completed. (App. 1e-1).

In March, 1995, Petitioner filed a motion for leave to file a second amended complaint. The proposed amendment included those defendants that were discovered as a result of document production by Bainbridge and Secondary Defendants in November, 1994. The second amended complaint included racketeering claims pleaded similar to those in the first amended complaint, including ***Pinkerton*** based RICO conspiracy claims. Petitioner similarly filed a RICO Case Statement. The motion, unopposed, was granted.

On 17 August 1995, the District Court entertained argument on various defendants dismissal motions directed at the second amended complaint. The District Court dismissed the amended complaint, explaining that the Secondary Defendants, most of which were originally joined in the first

amended complaint, could not be liable for Bainbridge and the 1968 and 1973 Trusts' racketeering activities based on their mere relationship or association. The District Court also concluded that the RICO claims alleged against these secondary defendants did not comport with Rules 8(a) and 9(b) of the Federal Rules of Civil Procedure. The District Court's opinion and order issued 30 August 1995. (App. 1g-1).

In February, 1996, the District Court entered judgment pursuant to Rule 54(b) of the Federal Rules of Civil Procedure. (App. 1h-1). Petitioner subsequently filed his Notice of Appeal in March, 1996.

On 11 June 1997, The Court of Appeals affirmed, finding that Petitioner had not shown how the amended pleading could be cured to satisfy Rule 8 and Rule 9(b). The appellate court did not consider Petitioner's legal arguments regarding RICO aiding and abetting, ***Pinkerton*** RICO conspiracy, and RICO ***respondeat superior*** claims.

On 21 August 1997, Appellees'\Cross Appellants'Heartland and Church Defendants' Petition for Rehearing from the affirmance of the denial of monetary sanctions. The filing of this Petition is timely pursuant to Supreme Court Rule 13.3.

REASONS FOR GRANTING THE PETITION

A. This Is An Appropriate Case For Resolving An Issue As To Whether The ***Pinkerton*** Doctrine, A Rule of Criminal Conspiracy Law, Can Be Invoked By A Private Civil RICO Litigant

1. ***Pinkerton*** Is Applicable To A Civil RICO Private Plaintiff.

No federal circuit decision has heretofore expressly recognized the availability of ***Pinkerton v. United States, 328 U.S. 640 (1946)*** to a private civil RICO plaintiff to premise a RICO Section 1962(d) conspiracy claim.

Though the Third Circuit upheld application of ***Pinkerton*** in a federal government civil RICO action, ***United States v. Local 560 International Brotherhood of Teamsters, 581 F. Supp. 279, 331 (D. N.J. 1984),affirmed, 780 F.2d 267 (3d Cir. 1985)***, there is no reason why ***Pinkerton***[1] should not otherwise be available to private RICO plaintiffs.

The most significant judicial expression implicitly[2]

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1 ***See Turner v. Upton County, 915 F.2d 133, 137 (5th Cir. 1990), cert. denied, 498 U.S. 1069 (1991)(Pinkerton*** applied in federal civil rights case); ***In re American Principals Holdings, Inc., 1987 WL 39746 at *9 n. 10 (S.D. Calif. July 9, 1987)(Pinkerton*** applied in federal securities fraud case).

2 Brenner, ***"Civil Complicity: Using The Pinkerton Doctrine To Impose Vicarious Liability In Civil RICO Actions,"*** 81 Kentucky Law Journal 370, 400 (1992-93).

recognizing application of ***Pinkerton*** in the RICO context is ***Securities Investor Protection Corp. v. Vigman, 908 F.2d 1461 (9th Cir. 1990), rev'd on other grounds sub nom. Holmes v. Securities Investor Protection Corp., 503 U.S. 258 (1992)***. In ***Vigman***, the Ninth Circuit clearly indicated that ***Pinkerton*** liability could be employed in a civil RICO action. Although not deciding the validity of using ***Pinkerton*** liability in civil RICO actions, the Supreme Court did state: "For purposes of this decision, we will assume without deciding that the Court of Appeals correctly held that Holmes can be held responsible for the acts of his co-conspirators." ***503 U.S. at 264,*** note 6.

Pinkerton suggests an expansion of the complicity and conspiracy concepts for RICO application. In light of ***Vigman***, a RICO co-conspirator passively participating in alleged racketeering activities is exposed to potential RICO liability, notwithstanding insufficient or patently absence involvement therein. Juxtapose this observation with the strict RICO "person"\"enterprise" distinction requirement for prosecuting Section 1962(c) claims and the pleading of multiple association in fact enterprises to circumvent that judicial impediment, a practitioner can logically envision application of ***Pinkerton*** on a comprehensive basis. Absent this application, courts addressing issues involving RICO conspiracies hold that claims

initiated under Section 1962(d) are controlled by the rule governing the substantive offense that was the object of the alleged RICO conspiracy.

Because the ***Pinkerton*** opinion includes agency terminology, the doctrine has been construed as imposing vicarious liability. But rather than abrogating the personal act requirement, ***Pinkerton*** holds one liable for the act of aligning oneself with others for criminal purposes; having done so, each non acting member of the conspiracy is liable for crimes committed by other conspirators because the individual's acts of alliance "caused" those crimes to be committed. This act is sufficient to satisfy the traditional causation requirements of criminal liability. Indeed, this act is certainly more blameworthy than the acts that suffice for imposing civil vicarious liability. The only element of criminal liability that is attenuated under ***Pinkerton*** is causation, which is construed just as it is under general complicity doctrines.

Neither the ***Pinkerton*** Doctrine nor complicity requires that one's wrongful act actually cause the commission of the crime for which the individual is held liable. Indeed, they rely on the concept of "mediate causation." "Mediate causation" refers to situations in which one's acts are deemed to have exerted ***a*** causal effect on another's conduct. Application of this conception of causation avoids the difficult task of specifying the ***actual*** effect such acts had on another's conduct

by making it possible to assume a causal effect sufficient to support liability. The result is the imposition of criminal liability that comports with traditional requirements by including the element of demonstrable personal fault.

Pinkerton, a rule of criminal complicity liability, is available to a civil RICO plaintiff. The alignment of defendants, through agreement, and by interposition of active collateral participants, to injure victims by fraudulent means, is cognizable to ascribe affiliative liability to RICO co-conspirators. Brenner's expose examining mediate causation to bely co-conspiratorial ***Pinkerton*** liability is significant:

> "This act [affiliating with another for a criminal purpose] satisfies the criteria for imposing accountability under the traditional criminal law standard of personal liability: affiliating with another for criminal purposes is a voluntary act committed with a culpable mental state, or ***mens rea***, that causes a prohibited social harm. (footnote omitted). In either of its guises, as ***Pinkerton*** liability or as complicious liability, this act is clearly more culpable than the act that suffices for imposition of vicarious liability in civil law. . . . Liability can attach under either form of affiliative liability without showing that the affiliative act actually caused commission of certain crimes, (footnote omitted). And because the affiliative act is a wrong in itself, liability can attach even though the target crime was not accomplished. (footnote omitted)."

Brenner, ***"Of Complicity and Enterprise Criminality: Applying Pinkerton Liability To RICO Actions,"*** 56 MO. L. Review 931, 963-964 (1991).

Petitioner's amended complaint identified the Secondary Defendants as RICO co-conspirators, premised on their affiliative alignment with Bainbridge and the 1968 and 1973 Trusts. The complaint alleged that Bainbridge, in those particular trustee capacities, simultaneously functioned as managing general partner, director, and officer of the multiple entities Bainbridge controlled, owned, or managed, with Secondary Defendants. Petitioner alleged that the two trusts were merely borrowing vehicles to obtain monies and properties from others, based on the combined represented financial worth exceeding $26,000,000. In fact, those trusts functioned as an elaborate subterfuge to facilitate the subsequent transfer of monies and properties acquired by Bainbridge to Secondary Defendants. The act of Secondary Defendants affiliating with Bainbridge and the two borrowing vehicles constitutes mediate causation wherein the alignment exerts causal effect on the conduct of the actor, satisfying ***Pinkerton***.

Secondary Defendants, notably Heartland and Church Defendants, were unknown to Petitioner at the time the funds were borrowed and the collateral substitutions occurred. During the time period in question, Bainbridge and the 1968 and 1973 Trusts had served as co-general partners with various Heartland partnerships, having contributed in excess of $1,000,000 to those partnerships. The 1968 and 1973 Trusts'

financial statements omitted disclosure of such entities. The one means for Petitioner to obtain relief from them is through invoking ***Pinkerton***. These Secondary Defendants derived the benefit of Bainbridge's racketeering activities inasmuch as Bainbridge interposed the two trusts between the lender and the ultimate recipient of monies and properties obtained by those trusts. Contractual privity is absent. No direct participation by Secondary Defendants in the borrowing and collateral substitutions is evident.

Petitioner's RICO conspiracy claims alleged that during the time frame of the loans and collateral substitutions, Bainbridge effected transfers of assets from the 1968 and 1973 Trusts to various Secondary Defendants that he, too, owned, controlled and operated, singularly or jointly, with other Secondary Defendants. These latter defendants agreed to accept these transfers. When the obligations became due, the two Trusts were admittedly insolvent. Lenders, like Petitioner, would be hard pressed to "trace" its monies through a complex Machiavellian labyrinth of entities and individuals to find the ultimate repository. Therefore, the appropriate application of ***Pinkerton***.

Pinkerton holds that a party liable for the consequences of a specific personal act - affiliating with another for criminal purposes. This act permits imposition of liability for crimes committed by those with whom one shares such a relationship.

The non-acting party is liable for these offenses because the criminal act of allying oneself with the acting party "mediately cause" them to be committed. Petitioner had pleaded such ***Pinkerton*** premised conspiracy claims to embrace Secondary Defendants who, by virtue of their alignment with Bainbridge and the 1968 and 1973 Trusts, as co-general partners, co-directors and officers, derived the benefit of primary defendants' racketeering activities. The Secondary Defendants are the financially sound persons that Petitioner can reach through ***Pinkerton***.

Professor Brenner's observation that ***Pinkerton*** is appropriate in civil RICO conspiracy litigation is compelling and supports Petitioner's position:

> "***Pinkerton*** clearly provides an alternative means of holding a party liable for subsections (a) and/or (b) offenses that it did not personally commit. This alternative is likely to prove useful for litigants who wish to impute liability for such offenses to a party whose accountability cannot be established under the conventional rules of vicarious liability discussed in this Article. (footnote omitted). The more important issue, however, is whether ***Pinkerton*** can be used to avoid the limitations that the "person-enterprise" rule imposes on imputing liability for subsection (c) offenses. (footnote omitted). The example given at the beginning of this section showed how ***Pinkerton*** can be used to impute liability to a nonacting conspirator; the critical question then becomes whether such use is inconsistent with the rationales behind the "person-enterprise" rule. If ***Pinkerton*** is inconsistent with the basic premises of that rule, it is likely to be disallowed as an "end run" around

> the rule (footnote omitted); but if there is no inconsistency, there should be no objection to ***Pinkerton***'s use in this regard."

Brenner, ***"Civil Complicity: Using The Pinkerton Doctrine To Impose Vicarious Liability In Civil RICO Actions,"*** 81 Kentucky Law Journal 369, 417 (1992-93).

Pinkerton, therefore, is appropriate to reach Secondary Defendants. Its invocation is consonant with the liberal construction clause under Title 18 United States Code Section 1964(c). It is, therefore, preferable to predicate the imputation of liability for such activity on principles that are consistent with those used to impose criminal liability. In criminal law, the personal commission of a "bad act" is generally a prerequisite for liability. Since ***Pinkerton*** bases the imputation of liability for substantive offenses on the commission of a unique "bad act" rather than on the existence of a specific relationship between parties, it is a preferable means of accomplishing this result in the context of civil RICO liability.

Since the availability of ***Pinkerton*** in the private plaintiff RICO context is an unresolved issue, it is therefore appropriate for review.

2. The Federal Circuits Are Divided As To The Appropriate Standard For Pleading A Civil RICO Conspiracy Claim.

The federal courts of appeals are divided as to the appropriate standard for pleading a civil RICO conspiracy claim under Title 18 United States Code Section 1962(d).

The current majority position, ascribing conspiratorial liability merely upon establishing that co-conspirators entered into an agreement to commit violation of RICO substantive provisions, and without actually committing two or more acts of racketeering activity, consists of the Sixth, Third, Ninth, Eleventh, Seventh, and Fifth Circuits. ***See United States v. Joseph, 781 F.2d 549, 554 (6th Cir. 1986); United States v. Adams, 759 F.2d 1099, 1116 (3d Cir.), cert. denied, 474 U.S. 971, 106 S.Ct. 336, 88 L.Ed.2d 321 (1985); United States v. Tille, 729 F.2d 615, 619 (9th Cir.), cert. denied, 469 U.S. 845, 105 S.Ct. 156, 83 L.Ed.2d 93 (1984); United States v. Carter, 721 F.2d 1514, 1529 (11th Cir.), cert. denied sub nom. Morris v. United States, 469 U.S. 819, 105 S.Ct. 89, 83 L.Ed.2d 36 (1984); United States v. Neapolitan, 791 F.2d 489, 497 (7th Cir.), cert. denied, 479 U.S. 940 (1986); United States v. Marmolejo, 89 F.3d 1185, 1196 (5th Cir. 1996), cert. granted in part, __ U.S. __, 117 S.Ct. 1079 (May 15, 1997).***

The minority position, requiring existence of a conspiratorial agreement to personally commit two or more forms of racketeering activity and actual commission thereof, consists of the First and Second Circuits. ***See United States v. Ruggiero, 726 F.2 913, 921 (2d Cir.), cert. denied sub nom.***

Rabito v. United States, 469 U.S. 831, 105 S.Ct. 118, 83 L.Ed.2d 60 (1984); United States v. Winter, 663 F.2d 1120, 1136 (1st Cir. 1981), cert. denied, 460 U.S. 1011, 103 S.Ct. 1249, 75 L.Ed.2d 479 (1983).

Advancing RICO conspiracy claims that embrace active concealment of the racketeering activity include RICO defendants prosecuted for aiding and abetting, derivative liability, or ***Pinkerton*** Doctrine premised RICO conspiratorial liability, is appropriate by demonstrating that Bainbridge and the 1968 and 1973 Trusts - the primary RICO defendants - managed or controlled the operations of the associational in fact enterprises for Section 1962(c) purposes. The Secondary Defendants are susceptible to RICO conspiratorial liability. The RICO "persons" intended to be held liable, Bainbridge and the 1968 and 1973 Trusts, are in fact separate and distinct from the association in fact enterprises comprised of various Secondary Defendant compositions, for Section 1962(c) purposes. That rigid separateness requirement is relaxed in the Section 1962(a) and Section 1962(b) context. ***Schreiber Distrib. Co. v. Serv-Well Furniture Co., 806 F.2d 1393, 1398 (9th Cir. 1986).***

Pleading civil RICO conspiracy claims is cogently reviewed in ***In re National Mortgage Equity Corporation Mortgage Pool Certificates Securities Litigation, 682 F. Supp. 1073 (C.D. Calif. 1987)***:

> "On the first round of motions to dismiss, the Court ruled that B of A had adequately pleaded a pattern of racketeering activity. ***[In re National Mortgage Equity Corporation Mortgage Pool Certificates Securities Litigation, 636 F. Supp. 1138 (C.D. Calif. 1986)] Id. at 1157.*** Adelman, however, contends that no pattern has been alleged as to him. The Bank is not required to allege facts showing that Adelman, who is charged with the RICO conspiracy under [Section] 1962(d), personally participated in or agreed to commit two predicate offenses. ***See United States v. Tille, 729 F.2d 615, 619 (9th Cir.), cert. denied, 469 U.S. 845, 105 S.Ct. 156, 83 L.Ed.2d 93 (1984)*** ("Proof of an agreement the objective of which is a substantive violation of RICO (such as conducting the affairs of an enterprise through a pattern of racketeering) is sufficient to establish a violation of section 1962(d)."). Proof of an agreement in RICO conspiracy cases "can, and often is, based on inferences drawn circumstantial evidence. ***United States v. Neapolitan, 791 F.2d 489, 506 (7th Cir. 1986).***"
>
> ***682 F. Supp. at 1093-1094.***

In re NMEC II ruled that RICO conspiracy pleading is not governed by Rule 9(b) but by Rule 8(a). Petitioner should have been accorded the opportunity to replead the RICO conspiracy claims against Secondary Defendants, based on both existing law and Petitioner's justified reliance upon the District Court's previous recognition of that approach in the first amended complaint.

The Ninth Circuit ruled in ***Neibel v. Transworld Assurance Company, 108 F.3d 1123 (9th Cir. 1997)*** that a RICO defendant can be liable as a RICO co-conspirator ***and***

found not to be liable on the substantive RICO claim. Petitioner's RICO claims, both substantive and conspiratorial, alleged against primary defendants, were upheld by the trial court. Under ***Neibel***, Petitioner can advance a good faith contention that various Secondary Defendants can be conspiratorially liable. Petitioner never alleged that Secondary Defendants committed substantive RICO violations.

Neibel cites and follows with approval both the Seventh Circuit in ***Gagan v. American Cablevision, 77 F.3d 951, 961, 964 (7th Cir. 1996)*** and the Third Circuit in ***United States v. Antar, 53 F.3d 568, 581 (3rd Cir. 1995)*** on this precise point of RICO law.

As noted in Part A, subpart 1, ***Pinkerton*** has been applied in the civil RICO conspiratorial context. A perusal of Judge Harold A. Ackerman's scholarly exposition in ***United States v. Local 560 International Brotherhood of Teamsters, 581 F. Supp. 279 (D. N.J. 1984)*** regarding RICO conspiracy law is equally compelling. Judge Ackerman correctly concluded that RICO conspiratorial liability could logically issue against a RICO co-conspirator even though that RICO person did not personally commit two predicate offenses:

> "I, therefore, concluded that a RICO "Enterprise" conspiracy may be established without personal conduct amounting to two personal predicate offenses. Instead, it is sufficient if the government demonstrates that agreement through the defendant's aiding and abetting in at least two such offenses, or through assent to the

> commission by someone else or several others of at least two such offenses. ***See Bannon v. United States, 156 U.S. 464, 468-69, 15 S.Ct. 467, 469-70, 39 L.Ed.2d 494 (1895)*** ("To require an overt act to be proven against every member of a conspiracy, or a distinct act connecting him with the combination to be alleged, would not only be an innovation upon established principle but would render most prosecutions for the offense nugatory.").

581 F. Supp. at 331-332.

The Fifth Circuit Court of Appeals recently ruled in ***United States v. Marmolejo, 89 F.3d 1185, 1195-1197 (5th Cir. 1996), cert. granted in part, __ U.S. __, 117 S.Ct. 1079 (May 15, 1997),*** to recognize the majority position of the federal circuits that a person can be conspiratorially liable by consummating an agreement to contravene RICO's substantive provisions, and without actually committing two or more forms of racketeering activity:

> "Today we join the majority view among the circuits in holding that to be guilty of RICO conspiracy, the conspirator must simply agree "to the objective of a violation of RICO; he need not agree personally to violate the statute." ***Neapolitan, 791 F.2d at 498.*** Our decision is mandated not only by the plain language of the RICO statute, but also by the nature and purpose of the statute."

89 F.3d at 1196.

The appellate court having found that a RICO

conspirator need not agree to personally perform the two predicate acts which compose the substantive violation of RICO, it ruled that the trial court's instructions on RICO conspiratorial liability were an accurate statement of law.

Inasmuch as the federal circuits are divided on the proper pleading standard applicable to pleading RICO conspiracy claims, the issue is appropriate for review.

B. The Federal Circuits Are Divided As To The Proper Application Of ***Respondeat Superior*** To Civil RICO Cases

The federal circuits are divided as to both the availability of ***respondeat superior*** and the pleading requirements in the civil RICO context.

The Ninth Circuit recognized the application of ***respondeat superior*** in civil RICO litigation in ***Brady v. Dairy Fresh Products Co., 974 F.2d 1149 (9th Cir. 1992)***. ***Brady*** embraced multiple RICO and federal securities fraud claims asserted by disgruntled investor participants in numerous tax shelter limited partnership investment vehicles that soured. The federal district court granted defendants' motion for summary judgment on the RICO claims, ruling derivative liability inappropriate. The district court further observed that "[t]here is no evidence to substantiate the claim that any defendant culpably participated as a principal in the alleged racketeering

pattern." ***974 F.2d at 1152.***

The Ninth Circuit reversed. Examining decisional law espoused by those federal circuits addressing the derivative liability issue, the court found agency and ***respondeat superior*** principles both appropriate and applicable under RICO. Accentuating the position that the rapidly evolving commercial world encouraged the adroitness of persons to promote business ventures through innovative measures as well as to structure a paradigm to immunize or otherwise restrict their direct participatory involvement, the appellate court correctly determined that derivative liability further exemplified Congress' intention of eradicating those activities proscribed under RICO.

Brady noted that it was not required to decide if ***respondeat superior*** may be employed to impose criminal liability:

> "Here we decide that the private civil claim created by section 1964(c) is broad enough to encompass respondeat superior and agency liability. Our examination of the substantive provisions of the RICO statute, which apply civilly and criminally, goes no farther than to determine if liability under respondeat superior or agency liability may occur in the civil claim created by section 1964(c). Therefore, the due process strictures placed on criminal statutes do not necessarily apply in this limited context."

974 F.2d at 1153-1154.

The Ninth Circuit position is similarly recognized by

the Third, Fourth, Fifth, Sixth, Seventh, Eighth, Eleventh, and D.C. Circuits. ***Petro-Tech, Inc. v. Western Co. Of North Am., 824 F.2d 1349, 1358 (3d Cir. 1987); Mylan Lab. v. Akzo, Ltd., 770 F. Supp. 1053 (D. Md. 1990), aff'g, 7 F.3d 1130 (4th Cir. 1993);. Crowe v. Henry, 43 F.3d 195 (5th Cir. 1995); Davis v. Mutual Life Ins. Co. Of New York, 6 F.3d 367, 378-379 (6th Cir. 1993); Ashland Oil, Inc. v. Arnett, 875 F.2d 1271 (7th Cir. 1989); K&S Partnership v. Continental Bank, N.A., 127 F.R.D. 664, 669 (D. Neb. 1989), aff'd, 952 F.2d 971 (8th Cir. 1991); Quick v. Peoples Bank of Cullam County, 993 F.2d 793, 798 (11th Cir. 1993); Cox v. Administrator U.S. Steel & Carnegie, 17 F.3d 1386, 1398 (11th Cir. 1994); Yellow Bus Lines, Inc. v. Local Union 639, 883 F.2d F.2d 132, 139-141 (D.C. Cir. 1989), adopted on reh'g, 913 F.2d 948, 951 (D.C. Cir. 1990) (en banc), cert. denied, 111 S.Ct. 2839 (1991).***

Though the Second Circuit has not rendered a definitive statement as to the application of ***respondeat superior*** to civil RICO, ***In re Ivan F. Boesky Securities Litigation, 36 F.3d 255, 262 (2d Cir. 1994),*** a recent federal district court decision recognizing that doctrine rationally justifies its invocation. Application of ***respondeat superior*** in the RICO context to passive RICO defendants, premised on their mere relationship with the active RICO malefactors, is illustrated by the United States District Court for the Southern District of New York in ***131 Main Street Associates v. Manko,***

897 F. Supp. 1507 (S.D.N.Y. 1996). The court denied passive co-general partners' motions to dismiss and for imposition of Rule 11 sanctions based on their mere association and affiliation with the active co-general partner who engaged in racketeering activities. The court reasoned it not untenable to conclude that if partners are held liable for the RICO violations of their partnership and co-partners, they will have an added incentive to reign in misconduct by their colleagues:

> "Nor do we see how imposing treble damages on an innocent actor, based solely on the nature of his relationship to a RICO wrongdoer, frustrates the purposes of RICO. If it is unfair, as the Taslitz defendants contend, it is not more so than imposing treble damages on an unwitting corporation for the antitrust violations of its agents - the very sanction upheld by the Supreme Court in ***ASME. See 456 U.S. at 574-76, 102 S.Ct. at 1946-48.***

897 F. Supp. at 1534.

Manko is instructive because it supports Petitioner's contention that the Secondary Defendants' relationship with the Primary Defendants can logically establish vicarious and conspiratorial liability. ***Manko*** correctly noted that the passive general partners had an incentive to "reign in" the managing partner's racketeering activities inasmuch as they derived a benefit. ***See Dowling v. Burke, 944 F. Supp. 1036, 1069-1070***

(E.D.N.Y. 1995) (***respondeat superior*** applied to RICO claims).

Petitioner's summary judgment motion on the RICO claims pled in the first amended complaint was denied inasmuch as the district court found a "plethora" of issues regarding Bainbridge and his interrelationship with Secondary Defendants. The Secondary Defendants were only alleged to be liable for RICO aiding and abetting, RICO conspiracy, and RICO ***respondeat superior*** liability, similar to those defendants in ***Brady*** and ***Manko***. Petitioner never alleged that they were primarily liable under RICO.

The First and Tenth Circuits, and various District Courts within the Second Circuit, have either severely criticized the applicability of ***respondeat superior***, or rejected it outright, in the civil RICO context. ***See Tribune Co. v. Purcigliotti, 869 F. Supp. 1076, 1089 n.8 (S.D.N.Y. 1994)***("the weight of authority in this district and other circuits is against the imposition of vicarious liability as a basis for civil liability under RICO"). ***See In re Citisource, Inc. Securities Litigation, 694 F. Supp. 1069 (S.D.N.Y. 1988)*** (***respondeat superior*** expressly rejected as a basis for Section 1962(c) liability). ***See also Rodriguez v. Banco Central, 917 F.2d 664 (1st Cir. 1990)***(expressly rejecting vicarious liability in civil RICO context) ***and Thraikill v. Champion Ford, Inc., 776 F. Supp. 1486, 1488-1489 (D. N.M. 1991)*** (same).

The allegations within the second amended complaint,

identical to those contained within the first amended complaint, charged Secondary Defendants with derivative liability for the racketeering activities engaged in by Bainbridge and the 1968 and 1973 Trusts. These Secondary Defendants occupied positions of control and authority to terminate Bainbridge's fraudulent activities, and they elected not to "reign in" his conduct. The failure of Secondary Defendants to "reign in" Bainbridge's racketeering activities resulted with Petitioner, and other lenders, being injured. Secondary Defendants benefitted as a result of such activities.

The RICO ***respondeat superior*** pleading issue is therefore appropriate for review.

C. The Ninth Circuit Position on Civil RICO Aiding and Abetting Is Contrary To The Position Recognized By Other Circuits Since ***Central Bank of Denver v. First Interstate Bank of Denver, 511 U.S. 164 (1994)***

Petitioner advanced RICO aiding and abetting claims against Secondary Defendants. The federal district court alluded in a footnote as to whether such alternative liability was available after ***Central Bank*** in the Opinion and Order, 30 August 1995, but elected not to address the issue. The appellate court has not ruled upon its continued existence after ***Central Bank***.

The Ninth Circuit recognized RICO aiding and abetting

liability in ***United States v. Wyatt, 807 F.2d 1480, 1482 (9th Cir.), cert. denied, 484 U.S. 858 (1987)***. The government did not have to prove two predicate acts of racketeering by defendant in order to establish her aiding and abetting in pattern of racketeering activity. The Fifth Circuit equally recognizes such liability. ***Crowe v. Henry, 43 F.3d 198 (5th Cir. 1995)***.

Various district courts in the Second and Seventh Circuit Court of Appeals now hold that civil RICO aiding and abetting is no longer available after ***Central Bank***. ***See Department of Economic Development v. Arthur Andersen & Co., 924 F. Supp. 449 (S.D.N.Y. 1996) and In the Matter of Lake States Commodities, Inc., 936 F. Supp. 1461, 1475 (N.D. Ill. 1996)***. One district court in the Fourth Circuit, however, holds a contrary position, citing to the liberal construction of Title 18 United States Code Section 2 as a sufficient basis to support a civil RICO aiding and abetting claim. ***See In re American Honda Motor Co., Inc. Dealerships Relations Litigation, 958 F. Supp. 1045, 1058-1059 (D. Md. 1997)***.

Civil RICO aiding and abetting is available under Title 18 United States Code Section 2. It is not a requirement that a civil RICO plaintiff allege that, in order to be liable as an aider and abettor, a person must engage in statutorily identified racketeering activity. ***See*** Blakey and Roddy ***"Reflections On Reves v. Ernst & Young: Its Meaning and Impact On***

Substantive, Accessory, Aiding Abetting and Conspiracy Liability Under RICO," 33 American Criminal Law Review 1345, 1460-1463, n. 441 (Special Edition 1996).

Inasmuch as the question of the availability of civil RICO aiding and abetting has divided the federal circuits, post ***Central Bank***, it is appropriate for review.

CONCLUSION

The reasons stated above, Petitioner respectfully requests that the Petition for a Writ of Certiorari be granted.

DATED: 10 October 1997

Respectfully submitted,

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Counsel for Petitioner

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FRANK WOOD, Trustee of the Wood Family Trust, Plaintiff-Appellant, vs. ELDEN W. BAINBRIDGE, et.al., Defendants-Appellees.	) No. 96-35289) D.C. No. CV-93-06084- TMC
FRANK WOOD, Trustee of the Wood Family Trust, Plaintiff-Appellant, vs. ELDEN W. BAINBRIDGE, et.al., Defendants, and WILLIAM G. KELLEY, et.al) Defendants-Appellants,	) No. 96-35363) D.C. No. CV-93-06084-TMC
FRANK WOOD, Trustee of the Wood Family Trust, Plaintiff-Appellant, vs.	) No. 96-35392) D.C. No. CV-93-06084-TMC

ELDEN W. BAINBRIDGE, et.al., Defendants, and HEARTLAND MORRISVILLE, et.al., Defendants-Appellants,	MEMORANDUM*[1]

Appeal from the United States District Court
for the District of Oregon
Thomas M. Coffin, District Judge, Presiding

Submitted May 9, 1997**[2]
Portland, Oregon

Before: BRUNETTI and KOZINSKI, Circuit Judges, and LEW, ***[3]

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

2

** The panel unanimously finds case suitable for decision without oral argument. See Fed. R. App. P. 34(a); 9th Cir. 34-4.

3

*** Hon. Ronald S.W. Lew, United States District Judge for the Central District of California, sitting by designation.

District Judge.

Frank Wood appeals the district court's dismissal of his Second Amended Complaint as to 111 "secondary defendants." The district court entered partial judgment pursuant to Fed. R. Civ. P. 54(b), and we have jurisdiction under 28 U.S.C. [Section] 1291. We review for abuse of discretion the magistrate judge's dismissal under Fed. R. Civ. P. 8(a), 9(b), and 41(b). McHenry v. Renne, 84 F.3d 1172, 1177-78 (9th Cir. 1996). The magistrate judge's evaluation of whether the plaintiff complied with his order is entitled to considerable weight. Id. At 1177. We affirm.

The Church-related defendants and Heartland defendants also cross-appeal the magistrate's denial of their motion for monetary sanctions against plaintiff Wood and his attorney Dean Browning Webb under Fed. R. Civ. P. 11. We review for abuse of discretion the magistrate's denial of defendants' motion for sanctions, Cooter & Gell v. Hartmarx Corp., 496 U.S. 384, 405 (1990), and we affirm.

I. Dismissal of the Complaint

On February 8, 1993 Wood filed his complaint. On February 23, 1995, after Wood had filed one amended complaint, the Magistrate judge ordered that if Wood chose to file a second amended complaint, he must simultaneously file a Rico case statement. The Magistrate judge instructed Wood how to draft such a document with great specificity. In response, Wood filed a largely incomprehensible 210-page complaint along with an equally muddled 94-page Rico case statement. The magistrate judge found that the Rico case statement did not comply with his order, and found that the complaint did not comply with Rule 8(a) or Rule 9(b).

Wood argues that the complex nature of RICO law and the business relationships of the 111 secondary defendants required the prolixity of his complaint. We disagree. The magistrate judge correctly explained that the complaint is too abstract to comply with Rule 8(a)'s "short and plain statement" requirement. The complaint rambles on about elaborate legal

theories and relationships without identifying specific conduct on the part of the 111 defendants that would subject them to RICO liability.

II. Sanctions

A. FRCP 11

The Church-related defendants argue that the district court abused its discretion in denying their request for monetary sanctions pursuant to Federal Rule of Civil Procedure 11. We may affirm on any basis supported by the record. United States v. Washington, 969 F.2d 752, 755 (9th Cir. 1992). The record reflects that the Church-related defendants failed to comply with Rule 11's safe-harbor provision by failing to raise their motion for sanctions until after the district court dismissed the secondary defendants. See Fed. R. Civ. P. 11(c)(1)(A). Accordingly, we affirm the court's denial of defendants' motion for monetary sanctions.

B. FRAP 38

The Church-related defendants also request attorneys'

fees and costs pursuant to Federal Rule of Appellate Procedure 38. Rule 38 allows this court to award just damages and single or double costs if it determines that the appeal is frivolous. we find that appellants' expansive theory of RICO liability is entirely without merit. Further, appellant has grossly disregarded Federal Rule of Civil Procedure 8(a)'s requirement that the complaint contain a "short and plain statement of the claim." Fed. R. Civ. P. 8(a). This disregard has caused the district court, this court, and defendants to spend an extraordinary amount of time and resources deciphering his complaint. On appeal appellant again has failed to identify how his 210-page complaint state's a claim against any of the secondary defendants. Rather, he assures the court that if given the opportunity, he can cure its defects. For these reasons we find that this appeal is frivolous. By separate order we grant the Rule 38 motion.

AFFIRMED.

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FRANK WOOD, Trustee of the Wood Family Trust, Plaintiff-Appellant/Cross-Appellee,	) Nos. 96-35289, 96-35363, 96-35292) D.C. No. CV-93-06084-TMC
vs.	) ORDER AMENDING MEMORANDUM
ELDEN W. BAINBRIDGE, et.al., Defendants-Appellees/Cross-Appellants.	

Before: BRUNETTI and KOZINSKI, Circuit Judges, and LEW, ***[1] District Judge.

The memorandum filed June 11, 1997 is amended as follows:

The first full paragraph on page 4 of the memorandum disposition is deleted. The following paragraph is inserted in

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*** Hon. Ronald S.w. Lew, United States District Judge for the Central District of California, sitting by designation.

its place:

> The Church-related and Heartland defendants argue that the district court abused its discretion in denying their request for monetary sanctions pursuant to Federal Rule of Civil Procedure 11. In our original disposition, we affirmed the district court's decision on the basis that the defendants failed to comply with Rule 11's safe-harbor provision. See Fed. R. Civ. P. 11(c)(1)(A). Defendants submitted a petition for rehearing pointing out that they did comply with safe-harbor and in his response, plaintiff has conceded such compliance. Upon further review of the record we agree that the defendants complied with the safe-harbor. Nonetheless, although we agree that the plaintiff's RICO claim is frivolous, we conclude that the district court did not abuse its discretion

in denying defendants' motion for monetary sanctions. See Pony Express Courier Corp. of America v. Pony Express Delivery Service, 872 F.2d 317, 319 (1989) ("The kind of sanction appropriate is left to the discretion of the district court.").

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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

FRANK WOOD, TRUSTEE OF THE WOOD FAMILY TRUST,	) CV 93-6084-TC)
	) ORDER GRANTING) PRELIMINARY) INJUNCTION
Plaintiff,	)
vs.	)
ELDEN W. BAINBRIDGE, individually, et cet. et.al.,	)
Defendants.	)

ORDER GRANTING PRELIMINARY INJUNCTION

Plaintiff's motion for preliminary injunction came on regularly before the court for hearing on March 1, 1994, the Honorable Thomas H. Coffin, United States Magistrate Judge, presiding, pursuant to an Order to Show Cause why a preliminary injunction should not be granted to enjoin and restrain defendants during the pendency of this action from transferring or otherwise disposing of any interest in any of defendants' real or personal property, of every description, except upon further order of this court.

Plaintiff, Frank Wood, Trustee of the Wood Family Trust, appeared personally and by counsel, Michael E. Swaim, and defendant Elden W. Bainbridge, appeared personally and as Trustee of the following defendant trusts: the Elden W. Bainbridge Trust, the Elden W. Bainbridge and Sharon Ann Bainbridge Trust, the Brian M. Bainbridge Inter Vivos Trust, the Dwight E. Bainbridge Inter Vivos Trust, the Marla Kay Bainbridge Inter Vivos Trust, the Todd C. Bainbridge Inter

Vivos Trust, the Melvin Bainbridge and Lois Bainbridge Inter Vivos Trust, the Brenda Lee Bolton Inter Vivos Trust, the Kenneth Bolton Inter Vivos Trust, the Steven Bolton Inter Vivos, the Valeria A. Bolton Inter Vivos Trust, the Brian Martin Banbridge Pavilion Trust, the Dwight E. Bainbridge Pavilion Trust, the Marla Kay Bainbridge Pavilion Trust; and as a general partner on behalf of the following limited partnerships: Bainbridge-Eight Limited, Bainbridge-Long Beach, BBG, Be Prepared, Big Estelle, Bristol-Bainbridge, Brookhurst Limited, Big Estelle, Central Avenue, Claims Investments Ltd. II, CVL Limited, Estelle 4, Estelle 5, Estelle 12, four Corners-Elsinore, Lemon Creek Automotive, Malibu-Bainbridge, Rider Limited, Sun Canyon Mobile Home Estates, Upland 380, Willow Oak Estates and Balsam Road; and as a general partner on behalf of the following general partnerships: 9th Street Industrial Park and Northwest Corona Industrial Park; and as a corporate officer on behalf of the following

corporations: Bainbridge-horn, Inc., Bainbridge Investments, Inc., B.I.I. Denver, Inc. Elron Investments, Inc., Silver Creek, Inc., and Willow Bridge, Inc.; with all of said defendants also appearing by counsel Jacob Tanzer. Defendants Brian Bainbridge, Dwight Bainbridge, Marla Bainbridge, Sharon Ann Bainbridge, and Todd Bainbridge, did not appear personally, but appeared through counsel, Jacob Tanzer.

Defendant Elden W. Bainbridge and counsel represented to this court that the defendants sued herein as: the Melvin Bainbridge Testamentary Trust, the Estate of Melvin Bainbridge, the Elden W. Bainbridge and Sharon Ann Bainbridge Trust Profit Sharing Plan, Alipaz, Big Estelle 68-1, Big Estelle 68-2, Big Estelle 68-3, Big Estelle 68-4, Big Estelle 68-5, Big Estelle 68-6, Big Estelle 68-7, b-12, Riverside-Eleven, Snow-Taylor, Sycamore Canyon Homes, Twin Buttes, Vegas Drive-Owens are not existing legal entities, and that defendant Elden W. Bainbridge is not, nor is any entity in

which he is a trustee, general partner, or corporate officer, a general partner in the following limited partnerships sued herein as: Durham Triangle, Fort Worth I-35, Heartland Lakeland Florida, Morrisville Triangle.

The court being fully advised, and good cause appearing therefor.

IT IS HEREBY ORDERED that defendant Elden W. Bainbridge, individually and as trustee of the Elden W. Bainbridge trust, dated June 13, 1968, the Elden W. Bainbridge and Sharon Ann Bainbridge Trust, dated May 9, 1973, the Brian Martin Bainbridge Pavilion Trust, the Dwight E. Bainbridge Pavilion Trust, the Marla Kay Bainbridge Pavilion trust, Todd C. Bainbridge Pavilion Trust, and the defendant limited partnerships Estelle 4 and Estelle 12, from transferring or otherwise hypothecating or disposing of any interest in any interest in any of said defendants' real or personal property, of every description during the pendency of this action, except

upon further order of this court.

Dated this 14 day of March, 1994.

/s/ Thomas M. Coffin
Thomas M. Coffin
United States Magistrate Judge

PRESENTED BY:

/s/ Michael E. Swaim
Michael E. Swaim, OSB No. 78092
Attorney for Plaintiff

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

FRANK WOOD, Trustee of the Wood Family Trust,	)	
Plaintiff,	)	Civil No. 93-6084-TC
v.	)	ORDER
ELDEN W. BAINBRIDGE, et. al.,	)	
Defendants.	)	

Plaintiff's motion for summary judgment (#241) on his RICO and ORICO claims is denied. The record is replete with disputed issues of fact that go to the essence of these claims. In summary form, the core of this case involves whether defendant Bainbridge acted with intent to defraud plaintiff Wood in connection with Bainbridge's borrowing of approximately $650,000 from Wood on two separate occasions. Beyond the fundamental issue of Bainbridge's intent in these

transactions, a plethora of issues is presented regarding whether and how the numerous individuals and entities named as defendants in this action played a part in the alleged fraudulent activity. Plaintiff 's bald and conclusory assertions that Bainbridge defrauded him and that Bainbridge controls the numerous trusts and partnerships named in the complaint and invested the fraudulently gained proceeds in these entities fall short of the requisites for granting summary judgment. Furthermore, plaintiff's boilerplate recitation of RICO case law in his memorandum in support of his motion for summary judgment is not helpful to the analysis of this case.

To the extent plaintiff is seeking summary judgment on the issue of whether Bainbridge or a specific entity for which he functioned as trustee is in default on a loan agreement(s), it is unclear from plaintiff's moving papers what the amount of the default is and which individual or entity he seeks judgment against. Defendant Bainbridge does not dispute the existence

of the loan transactions themselves or that the loans are in default. Plaintiff shall have 10 days from the date of this order to submit a proposed order of judgment with respect to the amount or default on these loans. Plaintiff shall specify in this proposed order the amount of default, the appropriate interest rate, and the individual and/or entity as to whom, a default judgment is to be entered against. Defendant Bainbridge shall have 7 days to file any objections to the proposed order.

CONCLUSION

Plaintiff's motion (#241) for summary judgment is denied. He may submit a proposed judgment on the notes as discussed above.

DATE this 29th day of September, 1994.

/s/ Thomas M. Coffin
THOMAS M. COFFIN
United States Magistrate Judge

ORDER

UNITED STATES DISTRICT COURT
DISTRICT OF OREGON

CIVIL MINUTES

CASE NO: 93-6084-TC

DATE: March 9, 1995

CASE TITLE: Wood v. Bainbridge

PRESIDING JUDGE: THOMAS M. COFFIN

DEPUTY CLERK: Leslie Malley

COURT REPORTER:

Record of Order: Defendants' objections (#297) to plaintiffs's proposed judgment order (between #300 and #301) are allowed in part and denied in part as demonstrated b y the Order of Judgment (#399) issued with this minute order.

The $150,000 note is not included in this judgment as plaintiff has not adequately demonstrated why such inclusion would be appropriate in light of defendants' uncontested assertion that plaintiff already has a consent judgment for this note and its interest in the Marion County Circuit Court of the State of Oregon. Attorney fees and costs are not included due to the requirements of Fed. R. Civ. P. 54(d)(2) and plaintiff's contention

RECORD OF ORDER

and defendants' denial of an offer of judgment in compliance with Fed. R. Civ. P. 68. Such issue will be considered after this action is completed when the issue of service of an offer of judgment will be addressed. Whether any other entities are jointly and severally liable for this judgment shall also be determined at such time.

RECORD OF ORDER

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

FRANK WOOD, Trustee of the Wood Family Trust,	)	
Plaintiff,	)	CV. 93-6084-TC
v.	)	ORDER OF PARTIAL JUDGMENT
ELDEN W. BAINBRIDGE, et. al.,	)	
Defendants.	)	

The motion of Plaintiff Frank Wood, Trustee of the Wood Family Trust,, for partial summary judgment upon his claims for relief under this action, having come on regularly before this Honorable Court, plaintiff appearing by and through his attorneys of record, the law offices of Edwin N. Storz and the law offices of Dean Browning Webb, and the defendant Elden W. Bainbridge having appeared both individually and in

his duly authorized representative capacity for those certain entities identified within his answer, and the defendants Sharon Ann Bainbridge, Todd Bainbridge, Brian Bainbridge and Dwight Bainbridge, appearing individually, the Court having reviewed and considered the arguments advanced in favor of, and in opposition to, Plaintiff's motion for partial summary judgment, and the Court having reviewed the matter independently for purposes of assessing whether partial summary judgment should, or should not be granted, and having reviewed the books, records and files of these proceedings,

GOOD CAUSE APPEARING THEREFORE,

IT IS HEREBY ORDERED, ADJUDGED and DECREED that, plaintiffs's motion for partial summary judgment on the claims for relief be, and is hereby ordered to be,

ALLOWED,

ORDER OF PARTIAL JUDGMENT

IT IS FURTHERMORE HEREBY ORDERED, ADJUDGED and DECREED that, since Elden W. Bainbridge, individually, as trustee of the Elden W. Bainbridge Trust, dated June 13, 1968, and in his representative capacity on behalf of certain entity defendants, does not dispute that the loan transactions in question are in default, plaintiff is hereby entitled to entry of judgment arising from the default as follows:

October 2, 1990 Promissory Note:	$500,000.00
Interest thereon at 15% 01/01/93 to 10/01/94:	$131,250.00
Three months unpaid 15% interest in 1992:	$18,750.00
TOTAL:	$650,000.00

AND IT IS FURTHERMORE HEREBY ORDERED, ADJUDGED and DECREED that, judgment be, and is hereby ordered to be, entered jointly and severally against the maker and two guarantors of the note, namely, the following

defendants:

Elden W. Bainbridge and Sharon Ann Bainbridge, trustees of the Elden W. Bainbridge and Sharon Ann Bainbridge Trust, dated May 9, 1973;

Elden W. Bainbridge trustee of the Elden W. Bainbridge Trust, dated June 13, 1968; and

Elden W. Bainbridge, individually.

AND IT IS FURTHERMORE ORDERED, ADJUDGED and DECREED that the preliminary injunction entered in these proceedings on March 14, 1994 shall remain in effect during the pendancy [sic] of execution of this judgment until such judgment is satisfied.

IT IS SO ORDERED.

DATE this 10th day of March, 1995.

/s/Thomas M. Coffin
THOMAS M. COFFIN
United States Magistrate Judge

ORDER OF PARTIAL JUDGMENT

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

FRANK WOOD, TRUSTEE OF THE WOOD FAMILY TRUST,	)
Plaintiff,	) Civil No. 93-6084-TC
v.	) ORDER
ELDEN W. BAINBRIDGE, et. al.,	)
Defendants.	)

COFFIN, Magistrate Judge:

Presently before the court are several motions to dismiss and a motion to strike (#545, #617, #619, #624, #625, #626, #639 and #649). The operative pleading in this case is in the form of a second amended complaint (hereinafter "complaint") which attempts to allege federal and state RICO actions against

over 114 defendants.[1]

The complaint asserts 64 claims and runs for 209 pages, exclusive of attachments.

Despite the requirement of Fed. R. Civ. P. 8(a) that a pleading contain ". . . a short and plain statement of the claim," the claims pleaded in this complaint are lengthy and convoluted. For the most part, it is difficult to understand from the complaint what the defendants are alleged to have done; at

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[1] It is difficult to even count the number of defendants in the complaint, as plaintiff includes as defendants "Does I through C." Assuming these are Roman numerals, and such people exist, there there are 214 purported defendants.

some parts, the complaint is simply indecipherable. For example, at paragraph 61 of the complaint, we find:

> Plaintiff is informed and believes, and based thereon alleges that the following individuals and/or entities function as general partners in the general partnership, identified hereinabove as Bainbridge General Partnerships, and by virtue of occupying said representative capacity thereof, are jointly and severally responsible for the tortious and fraudulent conduct engaged in by Elden W. Bainbridge, acting in his representative capacity as general partner, which he occupies in multiple trusteeship form. Plaintiff recently discovered in February, 1995, that Bainbridge Investment, Inc., a California corporation, is the general partner of the Heartland Morrisville Triangle, a Washington Limited Partnership. Bainbridge and his attorneys, Ball, Janik & Novack, had previously represented to plaintiff on 7 January 1994, at the U.S. District Court during a recess from the preliminary injunction hearing, that this particular partnership was not managed or controlled by Bainbridge, directly or indirectly. Plaintiff reasonably believes, based on this recent discovery of true facts, that Bainbridge Investments, Inc. is, or may be, singularly, or in concert with Bainbridge, individually, or as a trustee of the 1968 or 1973 Trust, a general partner of the other Heartland limited partnerships identified herein.

Unfortunately, such a paragraph is not rare in this massive pleading. As a result, many allegations are simply

unintelligible.

In addition, the bulk of the complaint against virtually all of the defendants is wholly conclusory in nature and impermissibly vague. [2] This not surprising, in view of plaintiffs's remarkable view of RICO liability.

To elaborate, the genesis of this case lies in two loans plaintiffs made to the 1968 and 1973 Bainbridge Trusts, the first (in 1990) for $500,000, and the second (in 1992) for $150,000. Plaintiff alleges that Elden Bainbridge made representations about his net worth, the collateral for the larger

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[2] Plaintiff provides some detail in his allegations regarding Elden Bainbridge and the 1968 and 1973 Bainbridge Trusts.

loan, and his intentions regarding repayment of the loans which induced plaintiff to lend the money. Ultimately, Bainbridge defaulted on the loans, and the 1968 and 1973 trusts had insufficient assets to repay plaintiff.

From this pad plaintiffs launches his RICO attack not just against Bainbridge and the two trusts involved in the transactions, but the 111 other defendants as well. As explained by plaintiffs's counsel in his memoranda filed in opposition to the various motions to dismiss and during oral argument at the hearing on these motions, the premise of plaintiff's case against those additional defendants is that RICO reaches conduct which is purely associational in nature. It is impossible to discern where the boundary lines are to be drawn on plaintiff's RICO playing field, but in essence Wood theorizes that any person or entity associated with Bainbridge is infused with RICO liability because of that association.

ORDER

Thus we find in plaintiff's memoranda in opposition to the various motions to dismiss: "The *causa sine qua non* of the RICO conspiracy claims pleaded against the defendants is premised upon *guilt by association*." Plaintiffs's Consolidated RICO Memorandum, p. 64.

The "guilt by association" theory assumes three subsets: ***Pinkerton*** conspiracy liability, ***respondeat superior*** liability, and aiding and abetting liability.

The ***Pinkerton*** approach is explained as follows by plaintiffs:

> Another facet of the RICO derivative liability is the application of the ***Pinkerton*** doctrine. This judicial postulate embraced federal criminal conspiracy and complicity issues, and it is another instrument to diagnose potential vicarious racketeering liability as to the defendants. Significantly, the alignment of Elden W. Bainbridge with the numerous trusts, partnerships, and corporations, and in concert with other individuals, mutually agreeing to Bainbridge's money raising and borrowing activities in the form alleged, by and through the employment of the 1968 and 1973 Trusts, is sufficient to invoke ***Pinkerton***.

ORDER

Memorandum in Opposition (#655), p. 31.

Translated, that means that all of the defendants (other than Elden Bainbridge and the 1968 and 1973 Trusts) are to be deemed co-conspirators because they are associated with Bainbridge. According to plaintiff, noting further is required:[3] the association is enough to impose a duty on these defendants to stop Bainbridge from making misrepresentations to Wood in connection with the two loans at issue. Even ignorance of Bainbridge's activities is no defense: according to plaintiff, the defendants' association with Bainbridge imposes a duty on them to track his conduct and thwart any misconduct.[4]

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[3] Although plaintiff's submissions are replete with conclusory allegations of conspiracy, fraud, etc., against all defendants, he conceded at the hearing, when pressed for particulars, that such allegations are premised upon the mere association of the defendants with Bainbridge.

[4] See Transcript of hearing on motions to dismiss, August 17, 1995, pp. 7-10. Plaintiff's expansive theory of liability leads him to the concession that he himself is

The ***respondeat superior*** category of RICO liability is built on exactly the same foundation: this dragnet includes any and all individuals and entities that have some co-equal or supervisory status vis a vis Bainbridge in any context whatsoever. Again, the theory is, for example, that a business partner of Bainbridge in a Florida development venture had a duty to monitor Bainbridge as he borrowed money from Wood in Oregon, regardless of whether the transaction had anything whatsoever to do with the Florida venture.

To completely encircle his quarry and, in an effort to ensure that no possible associate of Bainbridge escapes liability,

---

potentially liable as a RICO defendant because he was associated with Bainbridge, even though he is an alleged victim of Bainbridge's fraud.

ORDER

Plaintiff advances an aiding and abetting theory for employees, subordinates, beneficiaries, and other classes of defendants.

This category includes Bainbridge's children and Ronald Mollis, an attorney who had the misfortune in 1989 to draft a legal memo to another attorney in his firm regarding some potential tax issues affecting the Orange County Christian Church (OCCC), a non-profit supposedly religious entity founded by Bainbridge.

The Mollis saga is particularly instructive of plaintiff's view of the RICO universe. Wood's generalized view of the case is that Bainbridge would solicit funds from people and entities by making misrepresentations to them, and that he would then frustrate their efforts to collect on money he would then frustrate their efforts to collect on money he owed them by transferring assets out their reach, through shell corporations, partnerships, trusts, churches, etc.

A fundamental defect in plaintiff's pleadings is that no detail is provided as to any alleged fraudulent conduct on the part of any defendants, other than the two loan transactions between Bainbridge and Wood and another loan which Bainbridge attempted to solicit, in September of 1993, from David and Beverly McBratney.

Plaintiff specifies no connection between these three loan transactions and any of these defendants other than Bainbridge (and the 1968 and 1973 Trusts). In focusing on Mollis, no specific fraudulent or otherwise illegal act is set forth regarding him, or the OCCC. When pressed at the hearing as to the basis of the RICO charges against Mollis, plaintiff's counsel stated as follows:

> Mr. Webb — Our theory of the case against Mr. Mollis, as well as the majority of the other defendants, is that Mr. Mollis occupied a position as not only a lawyer with the firm of Sikora & Price, which

advised Mr. Bainbridge of the creation and formation of various trust planning vehicles, but also . . . Mr. Mollis had advised Bainbridge in that capacity with regard to the difficulties associated with the operation of his Orange County Christian Church. Now, these are matters we set forth in our pleading. See Transcript of Hearing, p. 4.

* * *

Mr. Webb

Mr. Mollis became a director and an officer in the creation of the Christian Fellowship Foundation, which is the entity that he advised Mr. Bainbridge must be created in order to preserve the tax exempt status and the operation of his Orange County Christian Church. See Transcript of Hearing, p. 5.

The Court

Well, I get the impression that your view of Mr. Bainbridge is that he has somewhat of a perverse Midas touch. That everything he becomes associated with becomes a RICO

defendant.

Mr. Webb — To a certain degree that trustee. . . See Transcript of Hearing, p. 7.

The Court — Did you tell me that you have traced money raised by Mr. Bainbridge from Mr. Wood to the church that Mr. Mollis was involved?

Mr. Webb — We have not traced Mr. Wood's specific money to that church, your Honor.

The Court — All right. Anybody's specific money?

Mr. Webb — Not anybody's specific money. No, your Honor.

The Court — What you have done is you have found out that some money was put into the church and you don't know the source of that money?

Mr. Webb — We know the contribution of the limited partnership interest from Mr. Bainbridge to the churches.

ORDER

* *

*

The Court	Is it the contribution of Mr. Bainbridge to the church that subjects Mr. Mollis to . . . prosecution as a RICO defendant?
Mr. Webb	No, it's not the contribution.
The Court	All right. What is it?
Mr. Webb	It is the failure of Mr. Mollis in his capacity as an officer and director of the Christian Fellowship Foundation ... not to ride herd and failure to ride herd on Mr. Bainbridge as he represents to lenders - such as Frank Wood and to various banks - that he's borrowing money in a particular capacity of the '68 and '73 trusts.... See Transcript of Hearing, pp. 11-12.

I have set forth the above colloquy at some length because it is far more illuminating of plaintiff's theory of the case than anything which can be found in the 209 page

complaint or the RICO case statement which the court ordered to be filed. Shorn of its vague and conclusory verbiage, a short and plain statement of plaintiff's claim against 111 of the 114 defendants[5] is that they were associated with Bainbridge as financial beneficiaries [e.g., his children], in business ventures [e.g., his partners], as charitable entities [e.g., the churches], or professionally [e.g., his attorney] and that they failed to stop him from making misrepresentations to Wood (and perhaps to the McBratneys) in connection with three loan transactions having nothing to do with them.

This does nots state a claim upon which relief may be granted. Plaintiff correctly cites ***United States v. Elliott, 571 F.2d 880, 903 (5th Cir. 1978)*** for the proposition that remote associates of an enterprise may be convicted as conspirators

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[5] The three exceptions are Bainbridge himself and the 1968 and 1973 trusts. Of course, if one considers the 100 additional John Doe defendants, the number is 211 out of

under the RICO conspiracy provision. However, he failed to quote a more applicable portion of such opinion:

> [RICO does not] punish mere association with conspirators or knowledge of illegal activity; its proscriptions are directed against conduct, not status (citation omitted.) To be convicted as a member of an enterprise conspiracy, an individual, by his words or actions, must have objectively manifested an agreement to participate, directly or indirectly, in the affairs of an enterprise through the commission of two or more predicate crimes. One whose agreement with the members of an enterprise did not include this vital element cannot be convicted under the Act.

Id. (emphasis added).

214.

ORDER

A plaintiff must allege and prove specific facts which establish an agreement to violate RICO by the commission of predicate acts or each defendant's personal participation, by act or agreement, in the predicate offenses. ***United States v. Tille, 729 F.2d 615, 619 (9th Cir. 1984).*** Moreover, Wood completely fails to plead facts necessary to allege an aiding and abetting claim under RICO, assuming such a claim currently exists.[6] For such a claim, plaintiffs had to allege (1) the existence of an independent primary wrong; (2) actual knowledge by the alleged aider and abettor of that wrong and his or her role in furthering it; and (3) "substantial assistance" by the aider and abettor in the achievement of the violation by the primary actor. ***See, e.g., Harmsen v. Smith, 693 F.2d 932, 943 (9th Cir. 1982), cert. denied,***

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[6] The existence of such a claim is highly unlikely due to the reasoning of the Court in the relatively recent ***Central Bank of Denver v. First Interstate Bank of Denver, 114 S.Ct. 1439 (1994)*** and ***Reves v. Ernst & Young, 113 S.CT. 1163 (1993).***

464 U.S. 822 (1988)[sic]; Walck v. American Stock Exchange, Inc., 687 F.2d 778, 791 (3rd Cir. 1982), cert. denied, 461 U.S. 942 (1983).[7]

Conclusory allegations that defendants had general knowledge of a fraudulent scheme do not state a claim for aiding and abetting a RICO violation. *Rolo v. City Investing Company Liquidating Trust, 845 F. Supp. 182, 233 nt.34 (D.N.J. 1993).* Instead, a plaintiff must allege specific facts that establish what each defendant did to aid and abet commission of the predicate acts or how each defendant's actions constituted "substantial assistance" of a RICO violation. Id.

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[7] Nor has plaintiff indicated how the defendants had an affirmative duty to act on behalf of the other defendants.

ORDER

Although plaintiff alleges generally that Bainbridge transferred assets through various entities in order to defraud his creditors (such as Wood), he fails to identify any such transfers specifically. As Fed. R. Civ. P. 9(b) mandates that "(i)n all averments of fraud ..., the circumstances constituting fraud ... shall be stated with particularity," the complaint is deficient in this regard.[8] This deficiency can neither be ignored nor glossed over. ***See, e.g., Semegen v. Weidner, 780 F.2d 727, 731 (9th Cir. 1985)*** (allegations of RICO violation predicated upon "conclusory allegations of fraud, conspiracy to commit securities fraud, punctuated by a handful of neutral facts" are

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[8] Plaintiff attempts to avoid Rule 9(b)'s mandate by asserting that such applies only to predicate acts of fraud, not RICO actions predicated upon other offenses, such as bribery and drug offenses. See pp. 24-25 of Plaintiff's Memorandum in Response to Heartland Defendants' Motion to Dismiss. This argument ignores the fact that plaintiff's RICO action herein is predicated entirely upon allegations of fraud - not drug dealing, bribery, or the other predicate offenses listed in 18 U.S.C. [Section] 1961(1).

ORDER

insufficient under Fed. R. Civ. P. 9 (b)). Again, to consider the plight of attorney Mollis as an example, although plaintiffs identifies a transfer by Bainbridge of a partnership interest to the OCCC as the reason Mollis is supposedly liable as a RICO defendant (for writing a memo to a colleague about the tax exempt status of the OCCC), he alleges nothing whatsoever that is fraudulent about such transfer, does not allege (and admits that he cannot identify) any particular creditor who was defrauded by this transfer, and concedes that the transfer predated Wood's loan to Bainbridge. **See** Transcript of Hearing, pp. 26-31.

CONCLUSION

It is manifest from plaintiff's RICO case statement and the representations by plaintiff's counsel at the hearing that there is no legal or factual basis for the multiple federal and

state RICO claims, as well as the related fraudulent transfer and other claims asserted against all of the defendants in the case (with the possible exception of Elden Bainbridge and the 1968 and 1973 Trusts). Plaintiff's conclusory allegations of conspiracy, fraud, aiding and abetting and so forth against the defendants is based entirely upon the notion that there mere association with Bainbridge subjects them to liability.

In that plaintiff attempts to assert a RICO case against the defendants which is premised upon predicates of fraud, the complaint fails to satisfy Fed. R. Civ. P. 9(b).

Further, as noted, the complaint does not comply with Fed. R. Civ. P. 8(a), in that it does not contain a short and plain statement of the various claims.

In addition, plaintiff's RICO case statement fails to satisfy the court's order of February 23, 1995 (#386) and thus dismissal of the case is warranted under Fed. R. Civ. P. 41(b).

ORDER

For all the above reasons, the defendants' motions as set out in the beginning of this opinion are are granted to the extend that plaintiff's second amended complaint is hereby dismissed.

In view of plaintiff's erroneous legal theory of the case and his inability to provide the required specificity for his factual allegations in the complaint and the RICO case statement, it is apparent that allowing him leave to amend against any defendants other than allowing him leave to amend against any defendants other than Bainbridge and the 1968 and 1973 Trusts would be futile. Accordingly, the dismissal as to all other defendants is with prejudice. Plaintiff shall have thirty days to file an amended complaint against the remaining defendants.

In view of this ruling, I need not address defendants' other asserted grounds for dismissal.

DATED this 30th day of August, 1995.

ORDER

/s/ Thomas M. Coffin

THOMAS M. COFFIN
United States Magistrate Judge

ORDER

H-1

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

FRANK WOOD, TRUSTEE OF THE WOOD FAMILY TRUST,	)
Plaintiff,	)Civil No. 93-6084-TC
v.	)PARTIAL JUDGMENT
ELDEN W. BAINBRIDGE, et. al.,	)
Defendants.	)

There being no just reason for delay, it is hereby ordred and adjudged in accordance with Fed.R.Civ.P. 54(b) that all defendants in this action except Elden Bainbridge and the 1968 and 1973 Bainbridge Trusts are entitled to judgment and are dismissed with prejudice.

DATED this 13h day of February, 1996.

/s/ Thomas M. Coffin
THOMAS M. COFFIN
United States Magistrate Judge

(2)

Supreme Court, U.S.
FILED
NOV 3 1997
CLERK

No. 97-687

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1997

FRANK WOOD, TRUSTEE OF THE WOOD FAMILY TRUST

Petitioner,

v.

ELDEN W. BAINBRIDGE, TRUSTEE, ELDEN W. BAINBRIDGE TRUST, JUNE 13, 1968, et.al.,

Respondents.

BRIEF OPPOSING PETITION FOR WRIT OF CERTIORARI To The United States Court Of Appeals For The Ninth Circuit

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COUNSEL OF RECORD

388

BRIEF OPPOSING
PETITION FOR WRIT OF CERTIORARI

This brief is filed on behalf of respondents Elden Bainbridge, his children and family, and the Bainbridge entities and family trusts.

Opinions Below

Petitioner's statement is accepted.

Jurisdiction

Petitioner's statement is accepted.

Statement of Facts

Petitioner's statement of facts is not accepted because it is based on conclusions rather than well-pleaded facts. The facts are stated in the laborious, confusing and repetitive allegations of the Second Amended Complaint. That document is too lengthy to summarize here. It is sufficient to say that its well-pleaded facts do not support Petitioner's assertions.

Reasons Not to Grant Petition

1. The conspiracy and respondeat superior issues are not properly presented for consideration. The Second Amended Complaint cannot be charitably described. The primary issue asserted to the Court of Appeals was whether the district court abused its discretion in refusing to allow plaintiff to file another amended complaint. That is not a certiorari-worthy issue.

2. The district court acted within its discretion. It required plaintiff to file contemporaneously with his amended pleading a RICO Case Statement stating all facts known to counsel on which the amended pleading was based. The RICO Case Statement, also conclusory and repetitive, demonstrates that plaintiff's problem is not a pleading deficiency, but a complete absence of facts. In opposing defendants' motions to dismiss, plaintiff's counsel asserted his theory that

RICO liability was predicated on "guilt by association" and that he knew of no specific facts or transactions to support his allegations of conspiracy and respondeat superior. See Petition G-3 et seq. The district court clearly acted within its discretion.

3. Because the asserted facts are presented in a defective pleading without a factual basis, they provide an insufficient factual basis upon which to consider the conspiracy and respondeat superior issues which Petitioner seeks to raise.

Conclusion

There is no reasonable basis for granting certiorari.

DATED October 29, 1997.

Jacob Tanzer

Counsel of Record for
Respondents Bainbridge, his
Children and Family, and the
Bainbridge Entities and Family
Trusts

(3)

Supreme Court, U.S.
FILED
NOV 17 1997
CLERK

NO. 97-687

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1997

FRANK WOOD, Trustee of the Wood Family Trust,
Petitioner

v.

ELDEN W. BAINBRIDGE, Trustee of the Elden W. Bainbridge and Sharon Ann Bainbridge Trust, et al.,
Respondents.

On Petition for Writ of Certiorari To the United States Court of Appeals for the Ninth Circuit

HEARTLAND RESPONDENTS' BRIEF IN OPPOSITION

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18 pp

QUESTION PRESENTED

Petitioner's theoretical ruminations concerning the scope of RICO liability are not at issue in this case. The only question presented is whether the Court of Appeals erred in holding that the District Court did not abuse its discretion in dismissing Petitioner's Complaint against 111 of 114 defendants, based on Petitioner's failure to comply with Federal Rules of Civil Procedure 12(b)(6), 8(a), 9(b), and 41(b).

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456 U.S. 949 (1982) 9

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729 F.2d 615, 619 (1984), *cert. denied*,
469 U.S. 845 (1984) 9

I. INTRODUCTION

The question presented by this case does not warrant review pursuant to a writ of certiorari. As discussed *infra*, the Ninth Circuit's decision is in harmony with decisions of this Court and with decisions of the other circuits. The Heartland Respondents therefore respectfully request that a writ of certiorari to review the unpublished judgment of the United States Court of Appeals for the Ninth Circuit be denied.

II. CORPORATE DISCLOSURE STATEMENT

None of the Heartland Respondents[1] have any corporate parent companies, subsidiaries (other than wholly-owned subsidiaries), or affiliates that have issued shares to the public.

III. JURISDICTION

The Heartland Respondents do not contest Petitioner's jurisdictional statement at this time, but continue to preserve all personal jurisdiction defenses raised in the courts below.

---

[1] The Heartland Respondents are: Heartland Lake Florida, a California limited partnership; Heartland Durham Triangle, a Washington limited partnership; Heartland Morrisville Triangle, a Washington limited partnership; Heartland Lakeland Florida, a Washington limited partnership; Heartland Fort Worth I-35, a Washington limited partnership; Heartland Group, Inc., a Washington corporation; and Heartland limited partnership, a Washington limited partnership. Heartland Lakeland Highway 37-B, a Washington limited partnership was a defendant in the District Court, but Petitioner did not appeal its dismissal to the Court of Appeals.

IV. STATEMENT OF THE CASE

A. Petitioner's Complaint

In 1990 and 1992, Petitioner loaned the Bainbridge Trusts $500,000 and $150,000, respectively. When the Trusts ultimately defaulted on the loans, Petitioner alleged that Mr. Bainbridge misrepresented his net worth, misrepresented the loan collateral, and lied about his intentions to repay the loan.

In May 1993, Petitioner's original attorney, Michael Swaim, filed a straightforward complaint against Elden Bainbridge and his two trusts, stating claims for breach of promissory note and fraud. Sometime after Mr. Swaim filed the original complaint, Dean Browning Webb—a self-proclaimed "RICO[2] Specialist"—replaced Mr. Swaim as Petitioner's counsel. Mr. Webb transformed the original seven-page complaint into a 210-page morass that the trial court described as "simply indecipherable," "wholly conclusory in nature," and "impermissibly vague."[3]

On February 23, 1995, the District Court ordered that if Petitioner chose to file a second amended complaint, he must simultaneously file a RICO case statement stating "in detail and with specificity . . . each defendant and . . . the alleged misconduct and basis of liability for each

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[2] Racketeer Influenced and Corrupt Organizations Act. 18 U.S.C. § 1961, *et seq*.

[3] Order on Defendants' Motions to Dismiss ("Order"), Tab 671 at 2.

defendant." (Tab 386 at 1.) In response, Petitioner filed his incomprehensible second amended complaint, along with an equally obscure RICO case statement.

Petitioner's 210-page second amended complaint ("Complaint"), names 111 "Secondary Defendants," including the Heartland Respondents.[4] The Complaint is replete with abstract RICO theory, completely devoid of any specific factual allegations against the Secondary Defendants. Rather, all of the defendants are lumped together in generic groups, wherein "said defendants" are alleged to have been involved with unspecified "fraudulent conduct."[5] Petitioner's RICO Case Statement is equally vague and conclusory.

B. The Heartland Respondents

Secondary Defendant Heartland Group, Inc. ("Heartland") is in the business of acquiring land in the path of development for future disposition. From 1984 until approximately 1990, Heartland sponsored approximately 27 land investment limited partnerships (the "Project Partnerships"). Heartland acted as the managing general partner of each Project Partnership, and Secondary

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[4] Petitioner did not serve the Secondary Defendants with his motion for leave to file a second amended complaint. The Heartland Respondents therefore had no notice of—or standing to oppose—the second amended complaint prior to their motion to dismiss.

[5] *See e.g.*, Complaint, Tab 455 at ¶¶ 137, 142, 147, 152, 157, 162, 167, 172, 179.

Defendant Heartland Limited Partnership ("HLP") acted as the initial limited partner and co-general partner of the Project Partnerships. Primary defendant Elden Bainbridge has never been a shareholder, board member, officer, employee, agent, general partner, limited partner, advisor, investor, lender or independent contractor of Heartland or HLP. (Declaration of Kim D. Stephens Regarding Petitioner's Motion for Order to Show Cause Regarding Production of Documents by Bainbridge, Tab 579 at 2-3.)

Mr. Bainbridge, through his trusts or corporations, is but one of the approximately 2,000 passive investors in the various Project Partnerships (some of which are also Secondary Defendants in this action). With the exception of one Project Partnership, Heartland Morrisville Triangle, none of the Bainbridge entities has ever been anything more than a limited partner or note-holder in any of the Project Partnerships joined by Petitioner in this appeal (i.e., Heartland Durham Triangle (leveraged notes), Heartland Fort Worth I-35 (leveraged note), and Heartland Lakeland Florida (limited partner)). Although Bainbridge Investments, Inc., is technically a co-general partner in the Heartland Morrisville Triangle Project Partnership, Heartland is the sole managing general partner and has the sole authority to represent this Project Partnership in connection with all financial matters. (Declaration of Dean Browning Webb, October 27, 1995, Tab 702, Heartland Entities Exhibit No. 2.)

Petitioner does not allege that Bainbridge acted on behalf of any Heartland entity in any of his dealings with Petitioner, nor can Petitioner trace any of the money he invested with Bainbridge to any Heartland entity. The simple truth is that the Heartland defendants constitute legitimate and ongoing businesses that have no relationship whatsoever with Petitioner. Petitioner's obscure and conclusory allegations to the contrary are patently meritless and equally offensive.

C. The District Court Dismissed Petitioner's Claims Pursuant to Fed. R. Civ. P. 12(b)(6), 8(a), 9(b) and 41(b)

In his Complaint, Petitioner sought to hold the Secondary Defendants derivatively liable for Mr. Bainbridge's alleged RICO violations. Petitioner attempted to state claims of conspiracy, aiding and abetting, and *respondeat superior*.

In June 1995, various Secondary Defendants—including the Heartland Respondents—filed motions to dismiss pursuant to Fed. R. Civ. P. 12(b)(6), 9(b) and 8(a). On August 30, 1995, the District Court issued an order dismissing Petitioner's Complaint against all of the Secondary Defendants. The court found that Petitioner failed to set forth any allegations that would trigger liability under any currently recognized theory of derivative liability. (*See* Order, Tab 671 at 3-11.)

The court outlined the patent deficiencies in Petitioner's pleadings as follows:

> It is manifest from plaintiff's RICO case statement and the representations by plaintiff's counsel at the hearing that there is no legal or factual basis for the multiple federal and state RICO claims, as well as the related fraudulent transfer and other claims asserted against all of the defendants in the case (with the possible exception of Elden Bainbridge and the 1968 and 1973 Trusts). Plaintiff's conclusory allegations of conspiracy, fraud, aiding and abetting and so forth against the [Secondary Defendants] is based entirely upon the notion that their mere association with Bainbridge subjects them to liability.[6]
>
> In that plaintiff attempts to assert a RICO case against the defendants which is premised upon predicate acts of fraud, the complaint fails to satisfy Fed. R. Civ. P. 9(b).
>
> Further, as noted, the complaint does not comply with Fed. R. Civ P. 8(a), in that it

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[6] The Court summarized the theory underlying Petitioner's claims as follows:

> Shorn of its vague and conclusory verbiage, a short and plain statement of plaintiff's claim against 111 of the 114 defendants is that they were associated with Bainbridge as financial beneficiaries [e.g., his children], in business ventures [e.g., his partners], as charitable entities [e.g., the churches], or professionally [e.g., his attorney] and that they failed to stop him from making misrepresentations to Wood . . . in connection with three loan transactions having nothing to do with them.

(Order, Tab 671 at 2, 8.)

> does not contain a short and plain statement of the various claims.
> In addition, plaintiff's RICO case statement fails to satisfy the court's order of February 23, 1995 and thus dismissal of the case is warranted under Fed. R. Civ. P. 41(b).

(Order, Tab 671 at 11.)

In response to the Secondary Defendants' motions to dismiss, Petitioner made it quite clear that these pleading defects could not be cured. Petitioner asserted in briefs submitted to the District Court that "guilt by association" is the "*causa sine qua non*" of his RICO conspiracy claims against the Secondary Defendants. (Plaintiff's Consolidated RICO Memorandum, Tab 660 at 64; Memorandum of Law in Opposition to Motion to Dismiss, Tab 653 at 52.) At oral argument, Petitioner's counsel conceded that his "guilt by association" theory would subject his own client to liability for the alleged RICO violations, because he too was "associated" with Bainbridge. (Transcript, Tab 670 at 35-36, 51.)

Petitioner has candidly conceded that the reason for advancing claims against the Secondary Defendants was to

reach their perceived "deep pockets."[7] Petitioner's "deep pocket" theory of "guilt by association" was plainly a willful attempt to reach defendants perceived to be able to satisfy a judgment, without any regard to their liability.[8]

The District Court correctly found that regardless of the scope of derivative liability in the RICO context, Petitioner could not state a cognizable claim for relief against the Secondary Defendants based on his theory of "guilt by

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[7] For example, Petitioner argued as follows:

> [*Brady v. Dairy Fresh Products, Co.* 974 F.2d 1149 (9th Cir. 1992)] strengthens the position of RICO plaintiffs to aggressively prosecute separate claims premised under this theory in order to reach a "deep pocket defendant."

(Plaintiff's memorandum in Opposition to Heartland Defendants' Motion to Dismiss, Tab 653 at 41 (citations omitted).)

Petitioner further clarified the reason for his "deep pocket" approach as follows:

> Plaintiffs original and successor counsel, by and through their pleadings, emphasized the necessity of advancing those claims in order to assure plaintiff's ultimate execution of a judgment upon defendants that could satisfy the judgment.

(Memorandum of Law in Response to C.R. 11 Motion, Tab 700 at 10.)

[8] The complete lack of Respondents' culpability is plainly demonstrated by Petitioner's RICO Case Statement (Tab 526); the statements made by Petitioner's counsel at oral argument on Respondents' Rule 12 motions (*see e.g.*, Transcript of Proceedings dated August 17, 1995, Tab 670 at 11-12); and the complete absence of factual support in the affidavits of Petitioner and his counsel (Affidavit of Frank Wood, December 7, 1995, Tab 722 at 1-8; Affidavit of Dean Browning Webb, October 27, 1995, Tab 702 at 20-22)

association."[9] The court concluded that in view of Petitioner's "erroneous legal theory of the case and his inability to provide the requisite specificity for his factual allegations in the complaint and the RICO case statement, . . . allowing him leave to amend against any defendants other than Bainbridge and the 1968 and 1973 Trusts would be futile." (Order, Tab 671 at 12.)

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[9] The District Court's rejection of Plaintiff's theory is sound. As the Fifth Circuit Court of Appeals noted in *United States v. Martino*, 648 F.2d 367 (1981), *cert. denied*, 456 U.S. 949 (1982): "We rejected the argument that RICO unconstitutionally punishes associational status; its proscriptions are directed against conduct, not status." The Fifth Circuit previously noted: The Act does not authorize that individuals 'be tried en masse for the conglomeration of distinct and separate offenses committed by others.' [citation omitted.] Nor does it punish mere association with conspirators or knowledge of illegal activity; its proscriptions are directed against conduct, not status. [citation omitted.] To be convicted as a member of an enterprise conspiracy, an individual, by his words or actions, must have objectively manifested an agreement to participate directly or indirectly in the affairs of an enterprise through the commission of two or more predicate crimes. One whose agreement with the members of an enterprise did not include this vital element cannot be convicted under the Act. *U.S. v. Elliott*, 571 F.2d 880, 903 (1978), *cert. denied*, 439 U.S. 953 (1978) (emphasis added).

The Ninth Circuit standard is the same. As the Ninth Circuit Court of Appeals noted in *United States v. Tille*, 729 F.2d 615, 619 (1984), *cert. denied*, 469 U.S. 845 (1984), to establish a RICO conspiracy, a plaintiff must plead and prove: (1) each defendant's personal participation, by act or agreement, in the predicate offenses; or (2) an agreement, the objective of which is a substantive RICO violation. Petitioner pled neither.

Even under the *Pinkerton* doctrine (*Pinkerton v. United States*, 328 U.S. 640 (1946))—which Petitioner urges should apply in civil actions—one must allege an unlawful agreement among the co-conspirators, the purpose of which is a substantive RICO violation. Petitioner failed to plead such an agreement by any of the Secondary Defendants.

The court accordingly dismissed the 111 Secondary Defendants with prejudice. The court further found that Petitioner's Complaint was frivolous and imposed non-monetary sanctions against Petitioner's counsel.[10]

Petitioner filed a Notice of Appeal to the Ninth Circuit Court of Appeals on March 11, 1996.

D. The Court of Appeals Rejected Petitioner's Assertion that the District Court Abused its Discretion in Dismissing Petitioner's Frivolous Claims.

In his opening brief to the Ninth Circuit Court of Appeals, Petitioner principally provided a recitation of current black-letter law regarding the scope of derivative liability under RICO. The Court of Appeals felt it unnecessary to reach the merits of Petitioner's RICO dissertation. Rather, the Court simply "review[ed] for abuse of discretion the magistrate judge's dismissal under Fed. R. Civ. P. 8(a), 9(b) and 41(b)."

Unanimously finding the case suitable for decision without oral argument, the Court held that "The complaint

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[10] Unfortunately, the Heartland Defendants are not the first victims of Mr. Webb's penchant for filing frivolous RICO claims. For example, in *Salstrom v. Citicorp Credit Services, Inc.*, 74 F.3d 183 (9th Cir. 1996), *cert. denied, Webb v. Citicorp Credit Servs.*, 1996 U.S. LEXIS 4704 (1996), Mr. Webb transformed a "simple straightforward debt collection action into a full-fledged assault that prompted the [district court] to impose sanctions."[10] *Id.* at 185. The district court awarded sanctions against Mr. Webb under 28 U.S.C. § 1927, and non-monetary sanctions under the court's inherent power.[10] *Salstrom v. Citicorp Credit Services, Inc.*, Civil No. 92-1226-AS, Order dated July 27, 1994. The Ninth Circuit affirmed these sanctions.

rambles on about elaborate legal theories and relationships without identifying specific conduct on the part of the 111 [Secondary Defendants] that would subject them to RICO liability."

The Court also imposed monetary sanctions under Fed. R. App. P. 38, justifying its decision as follows:

> [Petitioner] has grossly disregarded Federal Rule of Civil Procedure 8(a)'s requirement that the complaint contain a "short and plain statement of the claim." This disregard has caused the district court, this court, and defendants to spend an extraordinary amount of time and resources deciphering his complaint. On appeal, [Petitioner] again has failed to identify how his 210-page complaint states a claim against any of the secondary defendants. Rather, he assures the court that if given the opportunity, he can cure its defects. For these reasons, we find that this appeal is frivolous. By separate order we grant the Rule 38 motion.

(Unpublished Ninth Circuit Memorandum Opinion, No. 96-35289, dated June 11, 1997 at 3-4.)[11]

Petitioner's failure to provide the Court of Appeals with any specificity regarding his ability to cure the pleading defects of his RICO claims is astonishing in view of the District Court's admonition to Petitioner's Counsel during

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[11] The extent of the monetary sanctions is yet to be determined pursuant to Respondents' respective applications for damages and costs presently pending before appellate commissioner Robert Shaw.

the hearing on defendants' motions for sanctions in November 1995:

> [Y]our problem, Mr. Webb, is you deal strictly in the abstract and the general. When it comes time to mov[e] from the abstract to the particular and to specifics, that's where . . . quite frankly, you drop the ball . . . . Your abstract theories and general theories are one thing, but when it comes time to bringing lawsuits against specific people and entities and bringing them into court and causing them all the related harm that . . . litigation brings, there has to be a specific justification for it. And just dealing in the abstract doesn't cut it.

(Transcript of Hearing on Defendants' Motions for Sanctions, November 13, 1995, Tab 719 at 41-42.)

V. REASONS FOR DENYING PETITION

This Court will grant a petition for a writ of certiorari only for "compelling reasons," which include *inter alia*: (1) entry of a decision in conflict with the decision of another circuit regarding an important matter; (2) extreme departure from the accepted and usual course of judicial proceedings; and (3) entry of a decision in conflict with the relevant decisions of this Court. Sup. Ct. R. 10.

These considerations plainly militate against granting a writ of certiorari in this case. This Court and the circuit courts are in full accord that a district court may dismiss a complaint with prejudice where deficiencies in a pleading cannot be overcome—where amendment would be futile.

See e.g., *Partington v. Bugliosi*, 56 F.3d 1147 (9th Cir. 1995); *Ruffolo v. Oppenheimer & Co.*, 987 F.2d 129 (2nd Cir. 1993); *Sooner Prods. Co. v. McBride*, 708 F.2d 510 (10th Cir. 1983); *Jafree v. Barber*, 689 F.2d 640 (7th Cir. 1982). This Court has expressly recognized that "the grant or denial of an opportunity to amend is within the discretion of the District Court." *Foman v. Davis*, 371 U.S. 178,182 (1962). Petitioner cites no reason whatsoever—never mind a compelling one—to revisit this issue.

VI. CONCLUSION

In his Petition for Writ of Certiorari, Petitioner continues to deal in the abstract, yet again forcing Respondents to incur attorneys' fees and costs in defending against legal theories devoid of facts, rather than against a justiciable controversy. Petitioner's decidedly frivolous petition for writ of certiorari should be denied, and the Heartland Respondents should be awarded damages and costs pursuant to Sup. Ct. R. 42.

RESPECTFULLY SUBMITTED this 17th day of November, 1997.

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